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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 KEVIN LEE ESTES,

10 Plaintiff,

11 v.

12 WASHINGTON STATE DEPARTMENT OF  
CORRECTIONS, *et al.*,

13 Defendants.

No. 08-5749FDB/JRC

REPORT AND RECOMMENDATION

14 NOTED FOR:  
June 5, 2009

15 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned  
16 Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate  
17 Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff is proceeding *in forma pauperis* (Dkt. # 3).  
18 Before the Court is defendant's motion to dismiss for failure to exhaust administrative remedies  
19 (Dkt. # 33). Having reviewed the complaint, the motion to dismiss with its attachments, and the  
20 response, the court recommends that the motion be GRANTED and this action be DISMISSED  
21 WITHOUT PREJUDICE for failure to exhaust administrative remedies prior to filing the action.  
22

23 FACTS

24 Plaintiff is a Washington State inmate. He alleges the named defendants stalled on  
25 making copies for him. He alleges they also refused to make copies for him, and that his mail,  
26 including legal mail, was blocked. Plaintiff alleges a denial of access to courts (Dkt. # 4).

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1 Defendants move to dismiss for failure to exhaust administrative remedies prior to filing the  
2 action (Dkt. # 35). Defendants have placed before the court the affidavit of Devon Schrum. The  
3 affidavit shows plaintiff did not exhaust either of the grievances he filed regarding the facts  
4 surrounding this litigation (Dkt. # 35, exhibit 1). Further, plaintiff uses this case number in a  
5 level two grievance response to grievance number 0828479, which definitively shows the  
6 process was not complete prior to filing this action (Dkt. # 35, exhibit 1, attached grievances).  
7 Plaintiff's response cites to documents not properly before the court and does not contradict  
8 defendant's evidence (Dkt. # 40).  
9

#### 10 STANDARD OF REVIEW

11 The burden of pleading and proving failure to exhaust administrative remedies in the civil  
12 rights context is normally defendants. The court may consider evidence outside the pleading  
13 without converting the motion to a motion for summary judgment. Wyatt v. Terhune, 315 F3d.  
14 1108 (9th Cir. 2003). A motion to dismiss for failure to exhaust administrative remedies is an  
15 unenumerated 12 (b) motion.  
16

#### 17 DISCUSSION

18 The Prison Litigation Reform Act ("PLRA") requires exhaustion of administrative  
19 remedies prior to filing a complaint in federal court. The relevant portion of the act states:

20 No action shall be brought with respect to prison conditions under  
21 section 1983 of this title, or any other Federal law, by a prisoner  
22 confined in any jail, prison, or other correctional facility until such  
administrative remedies as are available are exhausted.

23 42 U.S.C. § 1997e(a).

24 The PLRA applies to plaintiff. The United States Supreme Court determined that  
25 Congress enacted the provision in order to reduce the quantity and improve the quality of  
26 prisoner suits. Porter v. Nussle, 534 U.S. 516 (2002). By mandating exhaustion, Congress  
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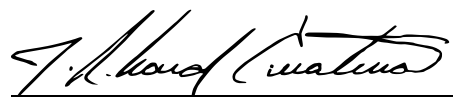
1 enabled corrections officials to address prisoner complaints internally. Where exhaustion was  
2 once discretionary, it is now mandatory. "All 'available' remedies must now be exhausted; those  
3 remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'" Porter  
4 v. Nussle, 534 U.S. 516 (2002) (quoting Booth v. Churner, 532 U.S. 731, 739 (2001)). The  
5 Porter Court ruled that "§ 1997e(a)'s exhaustion requirement applies to all prisoners seeking  
6 redress for prison circumstances or occurrences." Porter, 534 U.S. at 520.

7  
8 Plaintiff has failed to exhaust available remedies prior to filing this action. The fact that  
9 plaintiff is able to provide a cause number for this case in his level two response shows  
10 definitively that this action was filed prior to the grievance being appealed. Accordingly, this  
11 action should be **DISMISSED WITHOUT PREJUDICE**.

#### 12 CONCLUSION

13 This court recommends that the motion to dismiss for failure to exhaust be GRANTED.  
14 This dismissal should be DISMISSAL WITHOUT PREJUDICE and would not count as a strike  
15 pursuant to 28 U.S.C. 1915(g). Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal  
16 Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file  
17 written objections. *See also*, Fed. R. Civ. P. 6. Failure to file objections will result in a waiver  
18 of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).  
19 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for  
20 consideration on **June 5, 2009**, as noted in the caption.  
21

22 DATED this 11<sup>th</sup> day of May, 2009.

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26 J. Richard Creatura  
United States Magistrate Judge